stances of the person in relation to custody or not. They relate to a merely temporal matter, to the sequence, in relation to charging.

A person could be charged and served with a notice under section 117(3) whilst not in custody. Nothing in section 117, in my opinion, necessitates that the section applies to a person in custody.

In my view, contrary to that of Mr. Commissioner Garcia and the Chief Justice, there is no conflict between section 26 and section 117(1). They are not only reconciliable but are complementary. Section 26 applies to a confession made by a person in custody when he makes it, section 117(1) applies when a statement is made by a person not in custody.

Order accordingly.

Solicitors: *David Clidero & Co.*

YATOR BIN BUNTA v. PUBLIC PROSECUTOR

[A.Cr.J. (Roberts C.J.) July 31, 1987]

[Bandar Seri Begawan – Criminal Appeal No. 8 of 1987]

Criminal Procedure – Leave to appeal to Court of Appeal – Application for –Whether High Court has jurisdiction to grant leave – Supreme Court Act (Cap. 5) – Sarawak, North Borneo and Brunei (Courts) Order in Council 1951.

The applicant, Yator Bin Bunta, was convicted of murder and possession of firearm on June 15 after a trial by Macdougall J. and two assessors and was sentenced to death.

He applied for leave to appeal to the Court of Appeal, Brunei.

Held, dismissing the application: unless the application for leave has been made at the close of a trial for a certificate of the trial judge under section 18(1)(b) of the 1951 Order in Council, it will have to be made to the Court of Appeal itself when it is in session.

Case referred to:

(1) *Salim Rashid* v. *Public Prosecutor* Criminal Appeal No. 139 of 1986.

APPLICATION FOR LEAVE.

Francis Chiew for the applicant.

Dayangku Zabaidah (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

Roberts C.J. : The applicant was convicted on June 15, after trial by Macdougall J. and two assessors, of murder and of possession of firearm and was sentenced to death.

By an application dated June 24 (and so within the prescribed period of 14 days), he seeks leave to appeal to the Court of Appeal against his conviction.

I have thought it advisable to set out in writing my reasons for rejecting the application. I do so not because the law is uncertain but because it is difficult to find.

The Supreme Court Act (Cap. 5), which came into force on September 1, 1963, established a Court of Appeal for Brunei, in place of the Court of Appeal of Sarawak, North Borneo and Brunei.

The jurisdiction of the Court of Appeal is set out in section 6(6) :

"The Court of Appeal shall have the jurisdiction, powers, duties and authority:

(a) vested, immediately before the coming into force of this Act, in the Court of Appeal of Sarawak, North Borneo and Brunei so far as such jurisdiction, powers, duties and authority:

(i) are derived from any law in force in Brunei immediately before the coming into force of this Act; and

(ii) are not affected for the time being by any written law mentioned in paragraph (b); and

(b) conferred and imposed on the Court of Appeal by this Act and by any other written law enacted or made after the coming into force of this Act."

The effect of this subsection was therefore to continue the jurisdiction and powers of the previous court until these were replaced by Brunei laws.

In relation to civil proceedings, the Brunei High Court (Civil Procedure) Rules 1970 made provision for appeals in such matters to the Court of Appeal and revoked the various rules governing such proceedings which had been made under the Sarawak, North Borneo and Brunei (Courts) Order in Council 1951.

No similar provision has been made in relation to criminal appeals to the Court of Appeal. These continue to be dealt with under the 1951 Order in Council which, unfortunately, has not been included in the 1984 Revised Edition of the Laws of Brunei.

Criminal appeals are dealt with in section 18 of the Order in Council:

"18(1) A person convicted before the High Court may appeal to the Court of Appeal:

(a) as of right against his conviction on any ground of appeal which involves a question of law alone; and

(b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a mixed question of law and fact, or any other ground which appears to the Court of Appeal or the judge, as the case may be, to be a sufficient ground of appeal; and

(c) with leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

Nothing in that section, therefore, confers on any judge, other than the trial judge or a member of the Court of Appeal, jurisdiction to give leave to appeal.

Section 15 of the Order in Council empowers "a single judge of the Court of Appeal" to exercise "any power vested in the Court of Appeal, not involving the decision of the appeal".

Apart from the President of the Court of Appeal, the Court is composed of Commissioners who attend Brunei for sittings of the court about twice a year so that the composition of the court, apart from the President, varies from sitting to sitting.

By section 6(2) of the Supreme Court Act (Cap. 5), the Chief Justice is a judge of the High Court. He is not mentioned in section 6(3) which relates to the Court of Appeal and I must conclude that he is not intended to be a member thereof. Thus it is not open to him to exercise the powers conferred by section 15 of the Order in Council.

Therefore, unless application for leave has been made at the close of a trial for a certificate of the trial judge under section 18(1)(b) of the Order in Council, it will have to be made to the Court of Appeal itself when it is in session.

No doubt in appropriate cases, the court will be prepared to treat the application for leave as if it were the substantive hearing of the appeal itself.

I note for reference that section 18(2) of the Order in Council imports, with modifications, the main provision of the Criminal Appeal Act 1907 into Brunei law.

In *Salim Rashid* v. *Public Prosecutor*,[1] on February 7, 1987, I gave leave to the applicant to appeal to the Court of Appeal out of time against his sentence.

It is clear that, when giving leave, I overlooked the specific provisions of section 18 of the Order in Council and was therefore in error in granting such leave, having no jurisdiction to do so. It should therefore be disregarded.

Order accordingly.

Solicitors: *Ibrahim, Chee and Company.*